

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Ch. IX

[Docket No. N-94-3858; FR-3647-N-01]

RIN 2577-AB44

Vacancy Rule: Notice of Intent To Establish a Negotiated Rulemaking Advisory Committee and Notice of First Meeting

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice of intent to establish committee and of first meeting.

SUMMARY: The Department is considering the establishment of a Negotiated Rulemaking Advisory Committee under the Federal Advisory Committee Act (FACA). The purpose of the Committee would be to discuss and negotiate a proposed rule that would change the current method of determining the payment of operating subsidies to vacant public housing units. The Committee would consist of representatives with a definable interest in the outcome of a proposed rule. HUD has prepared a charter and has initiated the requisite consultation process pursuant to the FACA, Executive Order 12838, and the implementing regulations.

DATES: Comments must be received by February 2, 1995.

If the charter is approved and a final determination is made to form the Committee, the first meeting will take place March 7-9, 1995, at a location to be announced in Washington, D.C.

ADDRESSES: Interested persons are invited to submit comments regarding the proposed Committee and membership to the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500. Comments or any other communications submitted should consist of an original and four copies and refer to the above docket number and title. Facsimile (FAX) comments are *not* acceptable. The docket will be available for public inspection and copying between 7:30 a.m. and 5:30 p.m. weekdays at the above address.

The exact location of the first meeting on March 7-9, 1995, in Washington, D.C., will be announced in a subsequent **Federal Register** notice. Interested persons may also contact John

Comerford, at the telephone number listed below, for this information.

FOR FURTHER INFORMATION CONTACT: John T. Comerford, Director, Financial Management Division, Public and Indian Housing, Room 4212, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500; telephone (202) 708-1872, or (202) 708-0850 (TDD). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION:

Background

HUD uses a formula approach called the Performance Funding System (PFS) to distribute operating subsidies to public housing agencies (PHAs) and Indian housing authorities (IHAs). (NOTE: the term housing agency (HA) is used by HUD to mean both PHAs and IHAs.) A regulatory description of the PFS can be found at 24 CFR 990. Although somewhat oversimplified, the amount of subsidy received by a HA is the difference between projected expenses and projected income, with the PFS regulations detailing how these projections will be made. HAs calculate their PFS eligibility annually and submit a request for funding as part of their budget process. While the amount varies, this subsidy can represent a substantial amount of revenue to a HA. In 1994, HUD distributed over \$2.6 billion in operating subsidies to HAs.

The amount of dwelling rental income expected to be received is an important element in estimating subsidy eligibility. If rental income increases, it can generally be expected that operating subsidy eligibility will decrease. Likewise, if rental income decreases, an HA may receive a greater amount of subsidy. With some exceptions, HUD expects that HAs will project an occupancy level of 97 percent. This standard of 97 percent has been part of the PFS since its implementation in 1975.

That part of the PFS that deals with the projection of occupancy levels is known as the vacancy rule. The vacancy rule was published as a final rule in 1986 (51 FR 16835, May 7, 1986) and was intended to create incentives to HAs to return vacant units to occupancy and to maintain an occupancy level of 97 percent or higher. The rule provided these incentives by defining the conditions under which HUD would approve the use of an occupancy level of less than 97 percent; by specifying that an HA need not use an occupancy level higher than 97 percent; and, in recognition that a low number of vacancies may make it difficult for a

small HA to reach 97 percent, by finding it acceptable to use an occupancy percentage based on having five or fewer vacant units.

In September 1991, HUD published a proposed rule (56 FR 45814, September 6, 1991) that would have made significant changes to the way in which vacant units would be considered eligible for operating subsidy. These changes included:

1. Increasing the occupancy standard from 97 percent to 98 percent;
2. Eliminating HUD-approved Comprehensive Occupancy Plans (COPs) as a means to justify using less than the occupancy standard;
3. Limiting the amount of subsidy paid for vacant units greater than 2 percent of the total number of units available for occupancy; and
4. Instituting a year-end review to compare the actual occupancy achieved with the projected occupancy percentage.

HUD argued that the changes were needed in order to correct what it perceived to be a situation in which full operating subsidies (100 percent of the Allowable Expense Level) being paid for vacant units in modernization programs or in COPs were greater than the direct operating expenses incurred by the HA. With regard to COPs, HUD stated that HAs with the most extensive and difficult vacancy problems were expected to develop five year COPs in 1986 and that most of these would soon expire.

Before the comment period on the proposed rule expired, Congress inserted language in HUD's Appropriation Act for 1992 (105 Stat. 757) that prohibited HUD from using appropriated funds to implement the proposed rule. Later, Congress included a provision in the Housing and Community Development Act of 1992 (section 114(b), Pub. L. 102-550; approved October 28, 1992) to require that any changes to the PFS relating to the payment of operating subsidies to vacant public housing units be accomplished only through the use of negotiated rulemaking procedures.

Regulatory Negotiation

Negotiated rulemaking, or "reg-neg", is a relatively new process for the Federal government and this will be the first use of the process at HUD. The basic concept of reg-neg is to have the agency that is considering drafting a rule bring together representatives of affected interests for face-to-face negotiations that are open to the public. The give-and-take of the negotiation process is expected to foster

constructive, creative, and acceptable solutions to difficult problems.

In July 1994, HUD entered into an Interagency Agreement with the Federal Mediation and Conciliation Service (FMCS) for convening services that would assist HUD in assessing the feasibility of assembling a balanced committee willing and able to work towards the goal of consensus on a proposed rule that is within HUD's statutory authority and addresses the issues of the interested parties. If HUD proceeded with the formation of a negotiated rulemaking committee, the Interagency Agreement called for FMCS to provide facilitating services.

The final convening report was provided to HUD in September 1994 and concludes that "there is sufficient support to re-examine the vacancy rule through a regulatory negotiations process." A copy of the report titled *Convening Report for Regulatory-Negotiations on HUD's Vacancy Rule* is available in the office of the Rules Docket Clerk at the above address.

Chartering of Reg-Neg Committee

As a general rule, an agency of the Federal Government is required to comply with the requirements of the Federal Advisory Committee Act (FACA) when it establishes or uses a group of non-Federal members as a source of advice. Under FACA, HUD must receive a charter for this reg-neg committee. HUD has prepared a charter and sent it to the Office of Management and Budget for approval. If the charter is approved and schedule changes are not necessary as a result of public comments, the Committee will be convened in accordance with this notice.

Substantive Issues for Negotiation

The convening report identified the following issues to be addressed by the Committee:

- What constitutes an acceptable level of vacancies for housing authorities of various size classifications?
- What criteria should be used for providing less than full subsidy?
- What criteria should be used for providing full subsidy despite less than full occupancy?

Committee Membership

The FMCS conveners consulted and interviewed over 30 officials of various organizations interested and affected by the vacancy rule. Three national HA associations—the Council of Large Public Housing Authorities (CLPHA), the National Association of Housing and Redevelopment Officials (NAHRO), and

the Public Housing Authority Directors Association (PHADA)—worked together to suggest executive directors of HAs for committee membership that would reflect a balance among HAs in terms of size and number of vacant units. The national associations committed themselves to serving as staff support to the HAs selected for membership.

After reviewing the recommendations of the FMCS conveners, HUD has tentatively identified the following list of possible interests and parties:

Housing Agencies

- Housing Authority of the City Of Houston, TX
- Cuyahoga Metropolitan Housing Authority, Cleveland, OH
- New York City, NY Housing Authority
- Newark, NJ Housing Authority
- Reno, NV Housing Authority
- Littleton, CO Housing Authority
- Housing Authority of the City of South Bend, IN

Tenant Organizations and Public Interest Groups

- National Tenants Organization, Ft. Pierce, FL
- Bromley Heath Tenant Management Corporation, Jamaica Plains, MA
- New Jersey Association of Public and Subsidized Housing Residents, Newark, NJ
- National Housing Law Project, Washington, DC
- Housing and Development Law Institute, Washington, DC
- Illinois Association of Housing Authorities

Federal Government

- U.S. Department of Housing and Urban Development

Comments and suggestions on this tentative list of committee members are invited. HUD does not believe that each potentially affected organization or individual must necessarily have its own representative. However, HUD must be satisfied that the group as a whole reflects a proper balance and mix of interests. Negotiation sessions will be open to members of the public, so individuals and organizations that are not members of the committee may attend all sessions and communicate informally with members of the committee.

Requests for Representation

If in response to this Notice, an additional individual or representative of an interest requests membership or representation on the committee, HUD, in consultation with the FMCS conveners, will determine whether that

individual or representative will be added to the committee. Each additional nomination for membership on the committee must include the name of the nominee and a description of the interests the nominee would represent, evidence that the nominee is authorized to represent relevant parties, a written commitment that the nominee shall participate in good faith, and the reasons that the members proposed in this notice do not adequately represent the interests of the person submitting the nomination. HUD will make the decision on membership based on whether the individual or interest would be substantially affected by the proposed rule and whether the individual or interest is already adequately represented on the committee.

Final Notice Regarding Committee Establishment

After reviewing any comments on this Notice and any requests for representation, HUD will issue a final notice. That notice will announce the establishment of a Negotiated Rulemaking Advisory Committee, unless HUD's charter request is disapproved or HUD decides, based on comments and other relevant considerations, that such action is inappropriate.

Tentative Schedule

If the final determination is that the committee should be formed and negotiations started, HUD plans to hold the first meeting of the committee on March 7–9, 1995. On March 7, the meeting will start at 10:00 a.m. and run until completion; on March 8, the meeting will start at 9:00 a.m. and run until completion; and on March 9, the meeting will start at 9:00 a.m. and run until approximately 1:00 p.m. The exact location of the meeting in Washington, D.C., will be announced in a subsequent **Federal Register** notice. Interested persons may also contact John Comerford, at the telephone number listed above, for this information. The purpose of the meeting is to orient members to the reg-neg process, establish a basic set of understandings and ground rules (protocols) regarding the process that will be followed in seeking a consensus, and begin to address the issues. This meeting is open to the public.

Decisions with respect to future meetings will be made at the first meeting and from time to time thereafter. Notices of future meetings will be published in the **Federal Register** if time permits.

To prevent delays that might postpone timely issuance of a proposed rule, HUD intends to terminate the committee's activities if it does not reach consensus within 5 months of the first meeting. The process may end

earlier if the FMCS conveners/facilitators believe that sufficient progress cannot be made or that an impasse has developed that cannot be resolved.

Authority: 42 U.S.C. 1437g, 3535(d).

Dated: December 20, 1994.

Joseph Shuldiner,

Assistant Secretary for Public and Indian Housing.

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